

VAUGHAN  
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& SOTELO, PC

*The Trust And Estate Attorneys*



*Fiduciaries:  
What I Need to Know and Why*

## *Fiduciaries...*

Over the years we have found that most people do not really understand the important role that someone they appoint as a fiduciary will play in their lives or the lives of their beneficiaries. Because of this, we have written this fiduciary guide to give our clients a brief summary of the different roles of a fiduciary and a general understanding of a fiduciary's responsibilities. It is our belief that if you understand the different kinds of fiduciaries and what they do, you will be better equipped to make the right choices for you and your beneficiaries.

We hope that you will find this guide to be a helpful and useful tool to assist you in selecting the proper fiduciaries for your family.

Sincerely,

The Attorneys and Staff at Vaughan, Fincher & Sotelo, PC.

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## ***INTRODUCTION***

### ***What is a fiduciary?***

*Black's Law Dictionary* defines a fiduciary as “a person having duties involving good faith, trust, special confidence and candor towards another.” That sounds like a pretty lofty position and it is. Fiduciaries include executors, administrators, trustees, guardians for minors named in a will, attorneys-in-fact under powers of attorney and agents under medical directives. *Black's* states that fiduciaries follow “the highest standard of duty implied by law.”

### ***Why do I need to know about fiduciaries?***

If you don't understand how fiduciaries may play a role in your life and what you should expect from them, you could make a costly mistake by choosing the wrong persons or institutions to carry out your estate plan. You, your beneficiaries and your assets could suffer.

## ***FIDUCIARIES: WHO ARE THEY AND WHAT DO THEY DO?***

A fiduciary may be an executor or administrator, a guardian for minors named in a will, a trustee, an attorney-in-fact, or an agent under a medical directive. We will describe each one here.

### ***Executor or Administrator***

- If you have a will and appoint someone to carry out the terms of your will after your death, that person or institution is called an executor. Even if you have named your executor in your will, the person or institution must still qualify and be appointed as your executor by the person designated by the court in the county or city where you resided at the time of your death.
- If you do not have a will and die leaving assets “titled in your name only” (called probate assets), the court will appoint a person or institution to administer and settle your estate. That appointee is called an administrator.
- Your executor or administrator may be a family member, a friend, or a professional, such as an individual lawyer, a law firm, an accountant or a bank’s trust department.
- Your executor or a court-appointed administrator has five (5) main areas of responsibility:
  1. Meeting all reporting and filing requirements to administer and settle your probate estate, as required by the probate laws of the state where you were living at the time of your death.

2. Identifying and valuing all probate assets at the time of your death.
3. Paying all of your bills, funeral expenses, and estate administration expenses.
4. Filing your final income tax returns and estate tax returns (if necessary) and paying any income and estate taxes due.
5. Distributing all of your assets to the proper beneficiaries under your will or, if you did not have a will, under state law.

### ***Guardian for Minors Named in Your Will***

- Though the appropriate court must appoint all guardians for minors, you may state in your will whom you want the court to appoint as guardian for minor children named in the will.
- The guardian—usually an adult family member or close friend—will serve as a “parent substitute” until your children reach the age of eighteen.
- Because the court appoints a guardian, the person you name must file reports required by the state in which he or she is appointed.
- The guardian may be the same person you name as trustee in your trust or executor in your will; however, the guardian does not have to be the same. You may want a different person or institution in your trust or will to handle the financial assets of your minor children.

### ***Trustee***

- Often, a written trust agreement will name your trustee, whom you may choose using any of three (3) options:

1. Name yourself as primary trustee first and then name one or more successor trustees to serve if you cannot serve.
  2. Name someone to serve with you as co-trustee.
  3. Name someone other than yourself as the initial trustee.
- Your Last Will and Testament may also name a trustee to serve only after your death. This is known as a trust under the will or testamentary trust. As with an executor named in your will, however, that person or institution must still qualify and be appointed as the trustee by the clerk of the court in the county or city where you resided at the time of your death. A trust under the will or testamentary trust will be under court supervision.
  - If you name a trustee under a trust agreement created by you during your lifetime, the trustee will not be under court supervision.
  - Your trustee named in your will, or in a trust agreement created during your lifetime, may be a family member or friend, or a professional, such as an individual lawyer, a law firm, an accountant, or a bank's trust department.
  - A trust agreement or will usually defines the trustee's duties. Your trustee must carefully follow the directions in this document, as well as the state laws that govern trustees, to carry out four (4) main areas of responsibility:
    1. Working with your beneficiaries (which may include yourself) to meet their needs.
    2. Supervising investment of the assets held in your trust.
    3. Distributing assets to or for the benefit of you or your beneficiaries.
    4. Filing the trust's income tax returns and paying any taxes due.

## *Attorney-In-Fact*

- An attorney-in-fact is appointed under a Power of Attorney (POA) usually prepared by your lawyer. Typically, your Power of Attorney will be durable, which means it is valid even if you become incapacitated. Your attorney-in-fact under a POA has broad authority to act for you in financial matters, so you should choose carefully to ensure the agent will not abuse these powers and responsibilities.
- This person or institution serves as your agent in **financial** matters while you are living. You may want to choose a family member or friend, or a professional, such as an individual lawyer, a law firm, an accountant or a bank's trust department.
- Durable general powers of attorney are of two types—springing and non-springing:
  1. *Springing Durable General Power of Attorney.* Under this type of POA, your agent can act for you **only** when an event described in it occurs, such as your incapacity. The POA states your agent's responsibilities.
  2. *Non-Springing Durable General Power of Attorney.* Under this type of POA, your agent can act immediately on your behalf after you sign it. No triggering event is necessary. Again, the POA states your agent's responsibilities.
- All responsibilities of your Attorney-in-Fact stop at your death or whenever you terminate his, her or its appointment.



## *Agent under a Medical Directive*

- An agent appointed in your Medical Directive acts only in making informed medical decisions if you cannot do so. That happens when you cannot understand how a proposed medical decision may affect you or rationally evaluate its risks and benefits.
- Usually, two medical professionals must decide that you cannot make an informed decision.
- Your agent should be a person who knows and understands **your** preferences concerning medical treatment decisions. Usually, that is a family member or friend, but it may be a professional who knows your circumstances.
- Your agent's powers and responsibilities stop at your death or whenever you terminate his or her appointment.

## ***WHERE DO FIDUCIARIES APPEAR IN MY ESTATE PLANNING DOCUMENTS?***

Fiduciaries may appear in your will, trust, power of attorney, and medical directive, as shown in the table below.

<b>Document</b>	<b>Fiduciary</b>	<b>Role</b>
Will	Executor	Upon your death, collect, manage, and distribute probate assets according to the will and under the court's probate system
Will	Trustee under the Will	Manage trust assets to benefit your beneficiaries; distribute them according to terms of your will and under court supervision
Will	Guardian for minors named in the will	Serve as "parent substitute" under court supervision until minor children reach the age of eighteen (18)
Trust	Trustee	Manage trust assets for the benefit of beneficiaries and distribute them according to terms of the trust without court supervision
Power of Attorney	Attorney-in-Fact	Control and manage your financial assets and affairs during your lifetime
Medical Directive	Agent	Make medical decisions on your behalf if you are incapable of making an informed decision

## ***HOW DO I SELECT THE RIGHT FIDUCIARY?***

To effectively answer this question, you should understand how important fiduciaries are to your estate plan and what tools and skills they need to properly perform their jobs.

### ***Your Fiduciaries Are Key To Your Estate Planning***

One of the most difficult decisions you will have to make in estate planning is choosing which persons or institutions will carry out the planning you put in place. Your fiduciaries have significant authority over your affairs—making responsible medical decisions, helping you manage your finances and administrative details, and deciding wisely how to carry out distributions to your beneficiaries. This authority allows your planning to be most effective, but with great power comes great responsibility and risk.

Things can become complicated if your fiduciaries lack the right temperament, tools, and abilities to comply with your planning and the laws that apply to the jobs you have given them. You must carefully assess each of these characteristics as you select your fiduciaries.

### ***Your Fiduciaries Must Have The Right Temperament***

The most important attribute of fiduciaries is their ability to place others' interests above their own: your interests if serving as your agent, attorney-in-fact or trustee and your beneficiaries' interests if serving as your executor or trustee.

In naming your fiduciaries, you should reduce possible conflicts of interest and select those who have the right temperaments to respond properly. This problem can apply to corporate or individual fiduciaries:

- Financial concerns can create conflicts for corporate fiduciaries, such as banks or trust companies serving as trustees. They may have difficulty firing their own investment departments because of poor performance.
- Family tensions can create conflicts for individual fiduciaries. A typical example involves children who find it awkward to make difficult financial decisions affecting their brothers and sisters.

Naming objective, ethical fiduciaries in your documents will keep your planning on target and protect your interests and those of your beneficiaries.

### ***Your Fiduciaries Must Have The Right Tools And Abilities***

To complete their duties effectively, your fiduciaries should have certain tools and abilities or access to professionals who have them:

- All must have interpersonal skills to work well with your beneficiaries.
- Agents for medical decisions must be able to process information from medical professionals.
- Attorneys-in-fact, executors, or trustees—who handle finances—must be able to follow state laws, meet federal and state tax-reporting requirements, and manage assets under their control. State laws, such as the Uniform Prudent Investor Act and the Uniform Principal and Income Act, hold fiduciaries accountable if they fail to manage assets properly.

- Fiduciaries who handle your finances must also be adept at organizing information and paying close attention to detail.

If you are naming family members or friends as fiduciaries, they need not have the ability to complete all these tasks, but they should be able to recognize their limitations and utilize professionals who can assist them whenever necessary.

Selecting fiduciaries with the right temperament, tools, and abilities is one of the most critical steps in planning to distribute your estate. We are happy to help you choose the right fiduciaries to carry out your estate plan.

## ***OUR FIRM***

In the appropriate situations, Vaughan, Fincher & Sotelo is prepared to serve as your fiduciary. Our professionals have the experience, knowledge, and sensitivity to carry out the complex duties and responsibilities of serving as your fiduciary.

We encourage you to meet with one of our attorneys to discuss whether Vaughan, Fincher & Sotelo is the right choice to serve as your fiduciary.



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